80-217

Supreme Court, U. S.
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IN THE

Supreme Court Of The United States

OCTOBER TERM, 1980

NO. 80-————

CHARLES BEN HOWELL ..... *Petitioner*

v.

CARL THOMAS, SHERIFF,
DALLAS COUNTY, TEXAS ..... *Respondent*

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
NUMBER BELOW: 80-8,048

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Questions Presented

QUESTION ONE:

(1) WAS THE JUNE 25, 1979 RULING OF THE TEXAS COURT OF CRIMINAL APPEALS DENYING LEAVE TO PETITION FOR HABEAS CORPUS BASED UPON *ART.* 44.38, TXCCRP?

(2) IS *ART.* 44.38, TXCCRP REPUGNANT TO THE DUE PROCESS OR THE EQUAL PROTECTION CLAUSES OF THE 14TH AMENDMENT TO THE UNITED STATES CONSTITUTION?

QUESTION TWO: (Alternative to No. 1)

HAS PETITIONER BEEN DENIED EQUAL PROTECTION OF THE LAW UNDER THE UNITED STATES CONSTITUTION THROUGH THE DENIAL OF THE RIGHT OF APPELLATE COURT REVIEW OF THE STATE LAW CLAIMS RAISED BY HIM ON JUNE 25, 1979 EITHER BY APPEAL, HABEAS CORPUS OR ANY OTHER MEANS?

QUESTION THREE:

IN CRIMINAL ACTIONS INVOLVING IMPRISONMENT, DOES THE FEDERAL DUE PROCESS GUARANTEE OR THE FEDERAL EQUAL PROTECTION GUARANTEE REQUIRE THAT THE SENTENCING FUNCTION (i.e. the entry of comand that the adjudicated punishment be carried into execution coupled with any lawful or proper directions as to the terms and conditions of confinement) BE PERFORMED BY THE JUDGE OR MAY THE FUNCTION BE CONSTITUTIONALLY PERFORMED BY MINISTERIAL PERSONNEL?

QUESTION FOUR:

(1) SHOULD PETITIONER HAVE BEEN GRANTED AN EVIDENTIARY HEARING UPON HIS CLAIM THAT HE HAS ALREADY SERVED THE SENTENCE IN FULL AND HAS ALREADY PAID THE FINE IMPOSED UPON HIM FOR CONTEMPT OCCURRING BEFORE JUDGE WALKER ON MAY 26, 1971?

(2) IS THE CLAIM UNDER THIS ISSUE BEING PREMATURELY RAISED?

(3) DOES IT VIOLATE ANY FEDERALLY GUARANTEED RIGHTS TO FINE AND IMPRISON FOR TWICE THE AMOUNT OF PUNISHMENT ADJUDICATED?

QUESTION FIVE:

IS PETITIONER CORRECT IN HIS CONTENTION THAT A CERTIFICATE OF PROBABLE CAUSE, (being a prerequisite to an appeal to the Federal Court of Appeals by a state prisoner) MAY NOT BE DENIED UNLESS THE PETITION IS EITHER REPETITIOUS OR PLAINLY FRIVOLOUS? DOES THE WITHIN PETITION FIT ANY SUCH CATEGORY? DID THE DISTRICT JUDGE OR THE JUDGES OF THE FIFTH CIRCUIT APPLY THE PROPER TEST?

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PETITION FOR A WRIT OF CERTIORARI
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The Petitioner, Charles Ben Howell, complains of the respondent, Carl Thomas, Sheriff, Dallas County, Texas and petitions for the issuance of a writ of certiorari to the United States Court of Appeals for the Fifth Circuit to review the judgments and orders entered in that Court in its Cause No. 80-8048 where this petitioner was petitioner-appellant and this respondent was respondent-appellee.[1]

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[1]Unless otherwise indicated, all emphasis has been supplied by petitioner.

Opinions Below

The Magistrate's report, unpublished, filed September 18, 1979 is in the petitioner's appendix (A.4) [2] Neither the Fifth Circuit nor the District Court filed any opinion or engaged in any discussion of the facts, the law or the grounds of decision, orally or in writing. Inasmuch as nothing was available to publish, nothing was published. The appendix hereto contains the District Court's judgment dated October 10, 1979 (A.11) and the Fifth Circuit's orders denying certificate of probable cause dated March 17, 1980 (A.13) and denying reconsideration dated April 14, 1980 (A.13).

Opinions in related cases are:

Texas Court of Criminal Appeals, November 15, 1972, 488 SW2d 123, dism. 414 U.S. 803 (73).

Fifth Circuit, Original Appeal, July 16, 1975, 516 F.2d 53, cert. den. 424 U.S. 916 (76).

Texas Court of Civil Appeals, November 23, 1977, 559 SW2d 432 (77).

Fifth Circuit, January 16, 1978, 566 F.2d 470, cert. den. 439 U.S. 826 (78).

Jurisdiction

The order of the Court of Appeals denying certificate of probable cause was filed March 17, 1980 (A.13). A peti-

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[2]In referring to the record of proceedings in the courts below, petitioner will employ the following abbreviations: (A.) — Petitioner's Appendix attached to the rear of this petition; (R.) — Record of Proceedings prepared by U.S. District Clerk, Northern District of Texas. It should be noted that many of the papers from the latter court are copies of court papers originally filed elsewhere. No appendix was filed with or required by the Fifth Circuit.

tion for rehearing (Motion For Consideration) was timely filed on March 31, 1980 and denied on April 14, 1980 (A. 13). Within 90 days thereafter and on July 2, 1980, an application for extension of time to petition for certiorari was filed with the Clerk of this Court. On July 2, 1980, Mr. Justice Powell granted such extension to and including August 12, 1980. The jurisdiction of the Supreme Court is invoked under 28 *USC* §1254(1).

Constitutional Provisions, Statutes and Rules Involved

Art. 42.02. *Texas Code of Criminal Procedure.* A "sentence" is the order of the court in a felony *or misdemeanor* case made in the presence of defendant, except in misdemeanor cases where the maximum possible punishment is by fine only, and entered of record, pronouncing the judgment, and ordering the same to be carried into execution in the manner prescribed by law.

Art. 44.38. *Texas Code of Criminal Procedure.* The judgment of the Court of Criminal Appeals in appeals under habeas corpus shall be final and conclusive; and no further application in the same case can be made for the writ, except in cases specially provided for by law.

Statement of the Case

Petitioner is a leper of the law. The Texas Court of Criminal Appeals refused to allow him to file a petition for habeas corpus. The United States Magistrate refused to conduct an evidentiary hearing. The United States District Judge declined to hear evidence or argument and failed to substantively comply with R.22(b), FRAP requiring him to state his reasons for denying certificate of probable cause. The Court of Appeals proceeded to uphold denial of the certificate thereby preventing petitioner from briefing or arguing his case in that court.

Perhaps they were all of them infected with the notion that this petitioner has filed too many petitions already. However, as we all know, such is not the test.

Fact Statement-Background: As reported in *Howell v. Jones*, 516 F.2d 53 (5-TX 75), petitioner Howell became embroiled in controversy with a state court judge, the Honorable Dee Brown Walker concerning a May 26, 1971 divorce hearing. The controversy resulted in a contempt hearing before another state judge, the Honorable Louis T. Holland, on July 27, 1972. On that date Judge Holland ordered petitioner to jail for three days and fined him $100.00 upon a finding that he "failed to make full disclosure [to Judge Walker] as to all of the facts surrounding the matter before the Court after the Court had directly inquired" (A.3). By separate judgment of the same date, Judge Holland further held that petitioner had refused to reveal the names of the attorneys consulted by petitioner regarding his contempt case (A.1). Petitioner was ordered to jail until he revealed the names of the said attorneys. Punishment of $500.00 fine and thirty days in the county jail was also set.

Petitioner thereafter unsuccessfully sought habeas corpus relief, both state and federal. *Ex parte Howell*, 488 SW2d 123 (TXCR 72); *Howell v. Jones*, supra.

The identical incidents were made the subject of a disbarment proceedings. On July 16, 1976, a state court jury, by special verdict effectively exonerated petitioner of all charges. The jury found that Howell's refusal to reveal the names of attorneys consulted by him did not obstruct the administration of justice. Concerning the May 26, 1971 dispute with Judge Walker, the jury rejected Judge Walker's version of the facts as untrue and accepted petitioner's version. The material portions of the special verdict read as follows:

> "Do you find from a preponderance of the evidence that on or about the 26th day of May, 1971, at the time he obtained a default judgment in an action pending in Domestic Relations Court Number 2 involving divorce, property and custody of minor children, Charles Ben Howell did not tell Judge Walker that another action involving the same parties regarding divorce, property, and custody of minor children was pending in Domestic Relations Court Number 3?
>
> ANSWERED: NO."

> "Do you find from a preponderance of the evidence that on or about the 26th day of May, 1971, at the time he obtained a default judgment in an action pending in Domestic Relations Court 2 involving custody of minor children, Charles Ben Howell did not tell Judge Walker that a hearing involving the custody of minor children had been set by Judge Gibbs for June 2nd, 1971?

ANSWERED: NO."

"Do you find from a preponderance of the evidence that when Charles Ben Howell failed to answer a question relating to his motion for continuance which he was instructed by Judge Holland to answer, if you have so found, that he engaged in conduct that was prejudicial to the administration of justice?

ANSWERED: NO."

The foregoing are quoted from the record in *Howell v. Thomas,* U.S. S.CT. No. 77-1655 Apdx. to Pet. P.A.3-8 (78). A newspaper account of that trial is also annexed hereto (A. 14). The jury verdict was overruled in part by the judge conducting the trial, which action was affirmed in *Howell v. Texas,* 559 SW2d 432 (TXCVAP 77).

On the basis of the jury verdict in the disbarment case, petitioner again unsuccessfully sought federal habeas relief. *Howell v. Thomas,* 566 F.2d 470 (5-TX 78) cert. den. 439 U.S. 826 (78).

Fact Statement — Present Appeal. The Honorable Dee Brown Walker has been at all times judge of the 162nd District Court of Dallas County. The divorce case which generated this matter was, on May 26, 1971, pending in Domestic Relations Court Number Two and Judge Walker was substituting for the Honorable Greer Dowell who was then judge of that court. When the controversy arose, Judge Dowell declined to become involved and a retired judge, the Honorable Louis T. Holland was appointed to preside over the contempt proceedings against petitioner in Domestic Relations Court No. 2. Thereafter, Judge Walker had no jurisdiction over any proceedings against

petitioner Howell and his status was that of complaining witness only.

The Honorable Louis T. Holland died on April 23, 1978 (R.4) while the second habeas proceedings were being prosecuted and no other judge was ever appointed to preside over the contempt proceedings against petitioner. At the time he died, Judge Holland had never formally sentenced petitioner with respect to the 30 day conviction (R. 3-4).

On June 7, 1979, without any order or direction from the Judge of Domestic Relations Court No. 2 or from any other judge having jurisdiction in the case, the District Clerk of Dallas County issued and delivered to respondent sheriff two writs or processes directing respondent to place petitioner in jail in satisfaction of the three day and the 30 day contempt judgments (R. 8, 17, 19). According to the newspaper accounts annexed hereto, the Clerk acted because Judge Walker, acting ex parte, ex cathedra and without jurisdiction brought pressure to bear (A.16-19).

In the meantime, during 1977, the Texas Court of Criminal Appeals had granted habeas corpus relief to an attorney in another case on grounds that the attorney had been incarcerated without formal sentencing. *Ex parte Supercinski*, 561 SW2d 482 (TXCR 77). Considering *Supercinski* to be a "white horse" case, petitioner Howell's counsel prepared a state habeas petition and an accompanying motion for leave to file the habeas petition and personally carried them to Austin, Texas for filing with the Texas Court of Criminal Appeals[3] (R. 6, 10-53).

[3]By agreeing to the allegation that state remedies have been exhausted (R. 2, 8, 62, A.6), respondent has effectively conceded that petitioner followed the only route available under Texas law to obtain appellate review of his convictions.

On June 25, 1979 at approximately 4:00 p.m. petitioner's counsel personally entered the office of the Clerk of the said court and presented for filing the petition and motion for leave to file the same (R. 10-12). A supporting brief was also presented (R. 27-53). The petition and brief urged the *Supercinski* case and all other matters presented by this petition. Counsel was then and there ready to speak in support of the case and so indicated to the Clerk. However, counsel was given no opportunity to do so. While counsel was left waiting in the Clerk's office, the petition and supporting brief were presented to the Court for its examination en camera and in less than thirty minutes, counsel was handed the presiding judge's memorandum denying leave to file the petition (R. 6-7, A.3-4).

On June 27, 1979, petitioner filed a new petition for federal habeas (R. 1-53). By rotation, the Clerk assigned the case to the Honorable Patrick E. Higginbotham. Judge Higginbotham apparently found the case to be of argueable merit because, on the same date, he entered an order admitting petitioner to bail (R. 56). For such action, he was excoriated in the local press by Judge Walker (A.16-17). One day after his bail order, Judge Higginbotham transferred the case to the Honorable Robert M. Hill, presumably because all prior proceedings relating to the same matter had been handled by Judge Hill (R. 57).

On September 17, 1979, Judge Hill referred the case to Magistrate Sanderson (R. 72). Magistrate Sanderson considered the case for only one day and on September 18, 1979, the following day he filed a recommendation that habeas be denied (A. 4-10).

On October 10, 1979, only one day after the filing of petitioner's written objections to the Magistrate's report

(R. 79-95), the District Court entered an order reciting that it had considered such objections and that it had further made "an independent review of the pleadings, files and records in this case." The Magistrate's recommendation was approved and habeas relief was denied (A.10).

A motion for certificate of probable cause was filed on October 16, 1979 (R. 98), and was denied on the following day, October 17, "because of the reasons set out in the Findings, Conclusions and Recommendation of the United States Magistrate" (A.12).

Subsequently, a motion for new trial, asking *inter alia* for reconsideration of the denial of probable cause (R. 101-105), was overruled on October 26, 1979 (R. 106). In the motion for new trial, petitioner asked that if the Court continued to deny the certificate, that the Court state the reasons why the certificate should not issue in accordance with *R.*22(*b*) FRAP. However, the Order Overruling New Trial was wholly silent with respect to the request that the Court reconsider the denial of a probable cause certificate.

Notice of Appeal was thereafter filed on Monday, November 26, 1979 (R. 107). On January 4, 1980, Magistrate Sanderson filled out and filed a mimeographed form recommending that probable cause be denied, apparently on grounds that petitioner had restricted his petition to claims under state law (A.12). On the same day, the District Court again denied probable cause by signing the bottom portion of the same form (A.12). The printed form contains a recital that the Court has conducted a review of the files and records of the case. The space allowed for the District Judge to set forth his reasons for denial was not filled out (A.13).

A motion for certificate of probable cause was filed with the Fifth Circuit on January 22, 1980. In the motion, petitioner argued, as he here presents, that the District Court had not applied the proper test in denying probable cause (M/CPC. 11-14). The motion was denied by a single judge (A.12) and subsequently by a panel of the Fifth Circuit (A.13) from which action, this petition for certiorari is being prosecuted.

Reasons For Allowing The Writ

ONE & TWO

THE DOORS TO A STATE'S APPELLATE COURT MAY NOT ARBITRARILY BE CLOSED TO AN HABEAS PETITIONER

Obviously, it is not for the federal courts to dictate how issues of state law shall be decided save to determine if they contravene the Constitution and laws of the United States. However, it is a complete non-sequitur to say that inasmuch as state courts are free to shape state law according to their own choosing, that they are free to arbitrarily deny access to the state's appellate courts.

The key word, of course, is "arbitrarily." We think that the present record reflects an arbitrary denial of access to the court. Petitioner was denied leave to file an habeas petition presenting serious questions of state law. The denial was based upon en camera review of the petition lasting less than half of an hour. We present that the right of reasonable access to the courts is a federally protected right. If petitioner be correct in stating that the peremptory action of the Texas Court was grounded upon *Art.* 44.38 TXCCRP, it follows that the statute is constitutionally repugnant.

Petitioner does not (emphasis: does not) mount a facial challenge to the judge-made requirement of the Texas Court of Criminal Appeals that prior leave must be obtained in order to file a petition for habeas in that court. The federal scheme of habeas review contains parallel provisions for predicate review prior to plenary review. Both systems are entitled to insulate themselves from the frivolous and the trivial. On the other hand, neither system may consti-

tutionally employ such predicate review provisions as a means to deny plenary review of *serious* claims.

We proceed to expose the state law claims that were laid before the Texas Court of Criminal Appeals, not for the purpose of having them decided by the Supreme Court, but only for the limited purpose of demonstrating that petitioner's state law claims were indeed serious ones.

Ground Four-A of the writ application to the Court of Criminal Appeals read:

> "The process issued by the District Clerk which calls for relator to serve thirty days in jail and pay $500.00 fine is void because no judicial order of commitment in writing has been issued by any Judge of any Court having jurisdiction, calling for the Court's judgment to be carried into execution in the manner prescribed by law" (R. 37).

The argument under such ground, six pages in length (R. 48-53), pointed out that the judgment relating to the four attorneys contempt was actually two judgments contained within a single document. With respect to the so called "civil" (more properly denominated as "coercive") contempt, Judge Holland, the trial court judge, obviously entered his command that the adjudicated punishment be carried into execution. However, just as obviously, with respect to the thirty day and $500.00 criminal (punishment imposed for past infraction) contempt portion of his judgment, he withheld the entry of a similar command that the adjudicated punishment be carried into execution. In all likelihood, the withholding of a commitment order upon the thirty day conviction was deliberate. Judge Holland desired to reserve the opportunity to take a second look at

the punishment imposed after the coercive term of imprisonment had been completed. Judge Holland is now deceased and neither he nor any other judge has completed the imposition of sentence with respect to the thirty day conviction.

Petitioner argued to the Texas Court of Criminal Appeals that *Arts.* 42.02 et seq. TXCCRP was applicable and that he could not be imprisoned until a sentencing hearing had been held in compliance with the terms of those statutes. Primary emphasis was laid upon *Ex parte Supercinski,* 561 SW2d 482 (TXCR 77) holding that a lawyer adjudged guilty of contempt could not be imprisoned because the trial court judge had never completed the imposition of sentence.

In response to the foregoing argument, the United States Magistrate adopted respondent Sheriff's authorities, took upon himself the mantle of a judge of the Texas Court of Criminal Appeals and proceeded to rule against petitioner on principles of state law. It is submitted that neither a federal magistrate nor a federal judge may construe state law in connection with a federal habeas application, save on a preliminary basis. The Magistrate should have only reviewed the state claims to the extent necessary to determine if the state court acted arbitrarily in refusing a plenary hearing thereon. The ultimate disposition of the state claims is for the state court alone.

We further think the Magistrate's ruling upon the state claim to be untenable. Based upon citations dated 1920 and 1972, the Magistrate concluded that under Texas practice, it is not necessary for the judge to pass an order that the punishment be carried into execution and that such may be done ministerially. *Ex parte Woodruff,* 483 SW

2d 951 (TXCVAP 72), *Ex parte Coward,* 222 SW 531 (TXSM 20). Plainly, unless they are distinguishable, *those authorities were overruled* by the 1977 *Supercinski* case being urged by petitioner.

The Magistrate overlooked the fact that the Texas Court of *Criminal Appeals* is the state's highest court of appeal in criminal matters. The Texas Court of *Civil Appeals* is an intermediate and inferior court. The Texas Supreme Court is a co-ordinate court. While the State's two highest courts, out of comity, will ordinarily follow the decisions of the other, they are under no compulsion to do so. The case in bar, being within the actual and potential jurisdiction of the Court of Criminal Appeals must be governed by *Supercinski* regardless of what other Texas courts may hold.

Petitioner thinks that the Texas cases can be reconciled and fully briefed the matter to the District Court. However, we view the discussion as digression. Unless petitioner's reliance upon *Supercinski* was plainly misplaced, unless petitioner's state law claims were completely frivolous, the refusal by the Texas Court of Criminal Appeals to grant a hearing thereon constituted the type of arbitrary action forbidden by the Constitution. No amount of second guessing by the Magistrate as to how the Texas Court of Criminal Appeals might have decided this case upon its merits can remedy the arbitrary refusal to grant a hearing by the only court having jurisdiction to decide the matter.

We draw attention to another state claim, presented to the Court of Criminal Appeals as Ground Two-A upon which that Court likewise denied a hearing:

"The process issued by the District Clerk which

> calls for relator to serve three days in jail and pay $100.00 fine is void because the fine has already been paid and relator has served out the term of the conviction" (R. 6).

The habeas brief to the Court of Criminal Appeals devoted four pages to this proposition (R. 41-44). On two occasions, petitioner was placed in jail in satisfaction of the contempt judgments at hand and on each occasion, he was held past midnight (R. 23-24). Petitioner contended that under Texas law, any part of a day spent in jail counts as an entire day and that he thus has credit for four days spent in jail. He further contended that the District Clerk had misapplied his cash bail, had recorded the $100.00 fine as being paid and had remitted the bail money in the County Road and Bridge Fund (R. 25). Petitioner further contended that under Texas law, the two judgments in question are concurrent convictions and thus, the three day conviction has been completely served out and satisfied.

Again, the Texas Court of Criminal Appeals turned a deaf ear to the claim. Unless the claim was plainly frivolous, the Court's refusal of a hearing thereon was arbitrary and unconstitutional.

The Magistrate ignored the affidavit that the bail had been misapplied (R. 25) and likewise ignored the request for an evidentiary hearing upon the question (R. 8). He dismissed the remainder of the present state law claim by ruling that petitioner "cannot establish prospectively that he will not receive credit for time previously served" (A.8). The ruling begs the issue entirely.

At the time petitioner was turned away by the Texas Court of Criminal Appeals and also at the time the

Magistrate issued his ruling, respondent Sheriff was actively seeking to place petitioner in jail pursuant to a writ commanding respondent to imprison petitioner for three days and thereafter until petitioner paid a fine of $100.00 (R. 17). If petitioner was correct upon his state law claim, that writ was functus officio and void in its entirety. Petitioner was there entitled *not to be imprisoned at all* pursuant to the three day writ. Inasmuch as respondent Sheriff was then and there attempting to execute that writ, respondent was then and there entitled to challenge the writ, regardless of whether or not the companion writ for his imprisonment was valid. Moreover, the action of the Court of Criminal Appeals in refusing to hear challenges to the validity of either writ doubly placed petitioner in jeopardy of being completely deprived of his liberty without due process of law.

Please note how the Magistrate, in one breath, ruled the present petition "premature" and in the next breath, ruled it tardy by stating that the state law claims presently being urged could have been presented to the Texas Court of Criminal Appeals in 1972. The "premature" and the "tardy" rulings are equally untenable.

How was petitioner able to anticipate the *Supercinski* decision in 1972? Even further, how was he to anticipate that in 1979, the District Clerk would issue process for his imprisonment upon the thirty day convictions without the entry of a judicial command that the adjudicated punishment be carried into execution? In 1972, how could petitioner have anticipated that in 1979, the District Clerk would issue process for his imprisonment upon the three day conviction after the term of imprisonment had been fully served and the fine had been paid?

Even further, the Magistrate has misapplied the test. The test is not which points "could" have been raised in the previous writ, the test is "intentional by-passing." *Sanders v. United States*, 373 U.S. 1 (63) held that full consideration of the merits of a successive application can be avoided only if there has been an abuse of the writ and this, the government has the burden of pleading and proving. See also *Advisory Comm. Notes foll. Rule* 9, §2254 *Rules*, 28 USCA. Suffice to say that the State never satisfied its burden of showing how the matters herein could reasonably have been presented in a prior application.

Central to this entire argument is the question whether there is a federally protected right to petition a state appellate court for habeas corpus on state law grounds. It is submitted that such a right does exist. The history of the Great Writ and its position as a bulwark against unjust imprisonment was thoroughly explicated in *Fay v. Noia*, 372 U.S. 391 (63). The Texas Constitution, along with the organic document of every other English speaking jurisdiction, provides for the writ.

Petitioner's problem lies in *Art.* 44.38, TXCCRP which forbids more than one writ application with respect to the same conviction. This, presumably, was the reason for the summary rejection of the writ application under discussion; because petitioner had already applied to the Court of Criminal Appeals for habeas corpus in 1972.[4] It was necessary that this petitioner invoke the habeas jurisdiction of the Texas Court of Criminal Appeals in the first instance

[4]The previous opinion of the Court of Criminal Appeals described those proceedings as an appeal. However, as pointed out in **Ex parte Waters**, 499 SW2d 309 (TXCR 73) and again in **Ex parte Supercinski**, supra, that proceedings in the Court of Criminal Appeals was, in fact, an original habeas corpus proceedings.

because under Texas law, there is no right of appeal with respect to contempt convictions. *Arnold v. State,* 493 SW2d 801 (TXCR 73), *Ex parte Supercinski,* supra. Thus, when petitioner again sought habeas in 1979, *Art.* 44.38 constituted a barrier preventing him from obtaining a hearing on his state law claims.

Would *Art.* 44.38 pass constitutional muster if enacted by Congress as a restriction upon the right of federal courts to grant the writ? We think not. It is fundamental to federal constitutional law that the writ is *always available.* As long as the accused labors under the onus of his conviction, he is entitled to ask that a federal court inquire as to the justness thereof. The federal courts have refused to recognize all but two restrictions upon the right to successively petition for habeas relief. First, successive petitions may not be merely repetitious. Second, there may be no intentional by-passing of available grounds, meaning that the petitioner must exercise a reasonable effort to assert all available grounds in his original petition. *Fay v. Noia,* supra, *Sanders v. United States,* supra. Any congressional restriction upon the power of federal courts to grant the Great Writ comparable to *Art.* 44.38 simply would not be upheld.

We fail to see why a state created restriction upon the power of state courts to grant the writ could rest upon a more secure footing. The right of habeas corpus is equally as fundamental as the right of jury trial. Placing heavy reliance upon the widespread incidence of the right of jury trial in Anglo-American jurisprudence, it was held in *Duncan v. Louisiana,* 397 U.S. 145 (68) that no state may deny the right of jury trial upon serious offenses. Likewise, petitioner urges that no state may deny the right of habeas corpus. *Art.* 44.38 absolutely denies the right of habeas

corpus in part because it denies a second petition no matter how meritorious. Rules screening out petitions that are patently without merit are not comparable.

Texas law has placed unreasoned restrictions upon the right of habeas corpus. It cannot be argued that the federal constitutional right of jury trial includes the right to have one's punishment fixed by a jury. However, this Court has only recently held that wherever a state's organic law so provides, the right to have a jury fix one's punishment may not be judicially usurped. *Hicks v. Oklahoma,* 40 CCH SCT B 3050 (June 16, 80). That decision was mandated by *Vitek v. Jones,* 40 CCH SCT B 1495 (March 25, 80), *Wolff v. McDonnell,* 418 U.S. 539 (74) and *Morrissey v. Brewer,* 408 U.S. 471 (72).

We further urge that *Art.* 44.38 is particularly onerous upon persons convicted of contempt because Texas refuses appellate review of contempt convictions and the only available right of review is by habeas. Had this petitioner been accorded the right of appeal in the first instance, he could again approach the Court of Criminal Appeals on habeas. The non-availability of appeal in contempt cases makes *Art.* 44.38 all the more discriminatory in the present case.

The unreasonableness of *Art.* 44.38 is its monolithic nature, absolutely prohibiting successive writs, regardless of merit, thus raising the prospect that subsequent developments, particularly, as here, new Court constructions will not be available to those who have previously applied for the writ. Why should the Great Writ, that bulwark of liberty, be granted to *Supercinski* and denied to this petitioner? We can theoretically envision no policy consideration which would uphold such result other than general

principles of judicial repose. But, considerations of judicial repose have always been held subordinate to the writ of habeas corpus. As the federal system has amply demonstrated, there are other means, less restrictive upon liberty, that can be employed to deal with abuse of the writ.

In *Johnson v. Arizona,* 462 F.2d 1352 (9-AZ 72), cited by the Magistrate, it was held that the state must have a rational basis for the grant or denial of retroactive effect for its decisions. "Justice must be even handed." The case fully supports petitioner. No rational basis has been advanced for the grant of a writ to *Supercinski* and the denial thereof to petitioner.

Griffin v. Illinois, 351 U.S. 12 (56) and the line of cases emanating therefrom establishes that the avenues of appeal must be kept free of unreasoned distinctions. *Art.* 44.38 is such an unreasoned distinction and it must yield to constitutional attack.

THREE

SENTENCING, BEING A CRITICAL STAGE, MAY NOT CONSTITUTIONALLY BE OMITTED

The Magistrate brushed aside the present proposition by repeating the well worn generality declaring that mere procedural errors under state law are not of constitutional significance. The proposition is only true if no federally protected rights are involved. Obviously, neither the denial of trial by jury nor the use of uncounseled pleas of guilty for enhancement purposes may be dismissed as mere procedural errors. The Magistrate failed to recognize that with respect to the thirty day conviction, no judge has ever

judicially entered a command that the adjudicated punishment be carried into execution.

It is fundamental that only the judge of a court may issue judgments and orders. The Clerk only fulfills the ministerial function of issuing process to enforce the court's judgments and orders, previously rendered. Unless that process be supported by a valid judgment it is a nullity.

In Texas, sentencing is governed by *Arts.* 42.02 et seq. TXCCRP. We think the definition laid down by *Art.* 42.02 comports with the generally accepted notion of the sentencing function:

> " 'A sentence' is the order of the court * * * made in *the presence of the defendant* * * *, and entered of record, pronouncing the judgment, and ordering the same to be carried into execution in the manner prescribed by law."

At the time of sentencing, the court must determine the amount of credit, if any due to the defendant for time already spent in jail. Presently, the Clerk has undertaken to make that determination and, as already shown, has failed to give the proper credits. At the time of sentencing, the court in its discretion may provide that the sentence shall be served by the defendant during off-work hours or on weekends. The trial judge may attach conditions regarding the employment, travel and other conduct of the defendant during the performance of such a released time sentence. The court may condition a work-release program upon assignment of earnings. The statute specifically makes reference to contempt of court orders "for periodic payments for the support of a child." All of the foregoing matters are covered by *Art.* 42.03.

Before sentencing, Texas law requires that the defendant must be asked if he has any reason why sentencing should not be pronounced. *Art.* 42.07. At the time of sentencing, the court determines if a sentence shall be cumulative or concurrent. *Art.* 42.08.

With regard to the judgment fixing punishment at $100.00 fine and three days in jail for failure to "make full disclosure" to Judge Walker, it is plain that Judge Holland did pronounce sentence or enter commitment orders:

> "The Court hereby commits the said CHARLES BEN HOWELL to the custody of the Sheriff of Dallas, County, Texas until the fine and the term of imprisonment have been satisfied" (A.3).

Likewise, it is plain that petitioner was sentenced upon the "civil" or "coercive" judgment of contempt:

> "And the said CHARLES BEN HOWELL is hereby committed to the custody of the Sheriff of Dallas County to be confined in the Dallas County Jail until such time as he shall purge himself by revealing the names of the said four attorneys" (A.2).

The Fifth Circuit has relieved petitioner from coercive confinement. Petitioner may no longer be confined "until such time as he shall purge himself."

The remaining judgment, written in the same document as the coercive judgment only states:

> "And the Court further sets his punishment at a fine of $500.00 and confinement in the County Jail for a period of thirty days" (A.2).

With respect to this thirty day conviction, petitioner has never been brought before the Judge for sentencing,

sentence has never been pronounced, and no judicial order or commitment in writing has ever been rendered. While the Magistrate's report equivocates upon the matter, the facts are plain. Instead, the District Clerk of Dallas County, Texas, has presumed to draw up process directing respondent Sheriff to seize petitioner and place him in jail, but there has been no judicial command for such action.

Petitioner submits that imprisonment without a judicial commitment order and without formal sentencing is violative of due process. In addition, petitioner has been deprived of equal protection because those procedures are clearly mandated by the Texas statute.

Sentencing is a "critical phase" of the criminal process entitling the defendant to be present and to be represented by counsel. *Townsend v. Burke,* 334 U.S. 736 (48), *Mempha v. Rhay,* 389 U.S. 128 (67), *Argersinger v. Hamlin,* 407 U.S. 25 (72), *United States v. Huff,* 512 F.2d 66 (5-GA 75), *Turnbow v. Estelle,* 510 F.2d 127 (5-TX 75), *Ball v. United States,* 140 U.S. 118 (1891). The time of sentencing is the defendant's last chance before imprisonment to urge insufficiencies in the evidence or the proceedings. The formal sentencing is the proper time to argue for constitutionally guaranteed credits for time previously served. *North Carolina v. Pearce,* 395 U.S. 711, 718, 719 (69). Specifically with respect to contempt cases, denial of a sentencing hearing effectively denies the right of allocution, a constitutionally guaranteed right. *Groppi v. Leslie,* 404 U.S. 496 (72).

It is possible that the Magistrate did not distinguish between the adjudication phase and the sentencing phase of a criminal action. The two have always been considered separate just as the determination of guilt has always been considered as yet another entirely separate phase of the

criminal action. In Texas and numerous other states, the punishment is fixed by the jury. However, sentencing is universally a function of the trial court judge.

Even though Judge Holland entered a determination of guilt and set the punishment at thirty days plus $500.00, it is clear that he deferred the third phase of sentencing.

Does this mean that the third phase may be performed ministerially? The case of *Turnbow v. Estelle,* 510 F.2d 127 (5-TX 75) is to the contrary. Held, even though the punishment has been fixed at a previous hearing, the sentencing function remains a critical stage of the criminal process entitling the defendant to assistance of counsel. See also *United States v. Huff,* supra.

If a defendant is entitled to be represented by counsel at the time of sentencing, it necessarily follows that it is a due process requirement that such sentencing (i.e. the entry of a command that the adjudicated punishment be carried into execution coupled with any lawful or proper directions as to the terms and conditions of confinement) must be judicially performed and that the same can neither be delegated to the clerk, a ministerial officer, nor may the same be dispensed with entirely.

Neither Judge Holland nor any other Judge, while specifically addressing himself to the 30 day conviction has judicially declared, (1) in open court, (2) in the presence of petitioner, (3) having previously afforded to him the right to there be represented by counsel; that the judgment having become final and the defendant having been allowed to state why sentence should not then be pronounced and the defendant having offered no sufficient reason for delay in sentencing; that it was the order of the Court that the

judgment be carried into execution in the manner prescribed by law and that this petitioner be placed in jail for a period of thirty days and thereafter until his fine in the amount of $500.00 be paid. To the contrary, all of these judicial functions have been abandoned to or assumed by a ministerial officer, the District Clerk acting ex parte — a clear denial of Due Process of Law and Equal Protection of the Law.

FOUR

ATTACK UPON THE THREE DAY PROCESS WAS NOT PREMATURE

Petitioner's claims with respect to the writ or process issued by the District Clerk directing respondent Sheriff to place petitioner in jail for three days and until the payment of a $100.00 fine have been discussed in connection with questions one and two. Petitioner contends that he has already served out the sentence and has paid the fine. We can think of no more obvious deprivation of due process than to imprison a defendant again after his sentence has already been completed. Anyone who would argue the contrary simply has no understanding of the concept of Due Process of Law as that concept has been forged by generations of constitutional interpretation.

Of course, the Magistrate did not argue with petitioner's basic premise. Instead, he brushed it off with a declaration that it was "premature" (A.8). If I am being actively hunted by someone with a gun in his hand, is it premature to complain to the authorities that I am about to be shot? Similarly, when this petitioner filed his federal habeas petition, respondent Sheriff was actively seeking to place

petitioner in jail pursuant to the three day writ. If petitioner's contentions be correct, that writ is wholly void. To hold that petitioner "cannot establish prospectively that he will not receive credit for time previously served" is to ignore reality. Petitioner has a present right not to be imprisoned *at all* pursuant to a judgment that has wholly been satisfied.

It was once the law that the writ was not available unless it could potentially lead to the petitioner's immediate discharge. Thus, he could not attack only one of two concurrent sentences nor could he attack a consecutive sentence until he had commenced serving the particular sentence. *McNally v. Hill,* 293 U.S. 131 (34). This rule was expressly overthrown in a line of cases beginning with *Peyton v. Rowe,* 391 U.S. 54 (68). A prisoner serving concurrent sentences may attack one of those sentences because, as a practical matter, to have one of them set aside would enhance his chances of early release and relieve him from the stigma of a dual conviction. For similar reasons, a consecutive sentence to be served in the future may be immediately attacked with the writ of habeas corpus. In *Braden v. Court,* 410 U.S. 484 (73), it was held that a detainer, being no more than a request from another jurisdiction that the prisoner be turned over to the other jurisdiction to answer to an alleged offense in the second jurisdiction could be attacked by habeas.

The "prematurity" ruling was plainly wrong. Petitioner was entitled to an *immediate* determination of the validity of the three day process simply because the respondent Sheriff was attempting to *immediately* incarcerate him pursuant thereto.

FIVE

A CERTIFICATE OF PROBABLE CAUSE SHOULD HAVE BEEN ISSUED

The Supreme Court has never written upon the test to be applied in granting or denying a certificate of probable cause. In *Smith v. Digmon,* 434 U.S. 332 (78), the Supreme Court summarily reversed the denial of the certificate. Similarly, there is ample basis for summary reversal in the present case. The case may be returned to the Court of Appeals or the District Court because the District Court has never intelligibly complied with *R.*22(*b*) FRAP requiring the District Judge to "state the reasons why such a certificate should not issue."

Obviously, the certificate should be denied where the petitioner has restricted himself to claims under state law and has failed to invoke the Constitution and laws of the United States. As elementary as the principle seems, we are informed that numerous prisoner petitions possess this shortcoming. Likewise, the certificate should be denied with respect to successive petitions that are *plainly* repetitious or where the petitioner is clearly guilty of *Intentional* withholding. Beyond these rather obvious categories, petitioner submits that the certificate may not be denied unless the petition be "*completely frivolous and wholly without substance.*"

This is a successive petition, but it has not been intimated in any way that it is repetitious. The Magistrate did state that the claims could have been raised in 1972, but at no stage of the proceedings did he hold petitioner to be guilty of intentional by-passing which is the only relevant ground for denying a successive writ. As stated more fully under

questions one and two, petitioner could not have raised the present claims in 1972 unless possessed of a high degree of occult omniscience. We would finally point out that the Magistrate did not assign intentional by-passing as a grounds for denying the certificate of probable cause.

As noted in "Fact Statement — Present Appeal," the Magistrate did not recommend the denial of the certificate at all in his original report. Contrariwise, we read the last paragraph thereof as some indication that the Magistrate then considered that an appeal should be allowed.[5] The denial of probable cause originated with the District Judge's order of October 17 (A.12). That order did not comply with *R.*22(*b*) FRAP because it did not set out the "reasons" for denial except to refer to the Magistrate's report wherein the problem simply was not addressed. Two months later, the District Court having already spoken, the Magistrate obediently filled out a mimeographed form recommending that the Court do what it had already done; deny probable cause. At that time, the Magistrate returned a seven word determination which stripped of verbiage states:

> "Petitioner's claims arise under Texas State law * * *" (A.12).

The finding demonstrably fails to square either with the petition on file in the District Court or the prior recommendation of the Magistrate himself.

Possibly, the Magistrate failed to take notice of the

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[5]It is to be noted that Magistrate Sanderson had only recently come to his position. In his previous position as Assistant United States Attorney, he did not deal with state prisoners and the requirement for a certificate of probable cause.

rule that federal question jurisdiction is to be determined solely from an examination of the petition.

> "It cannot be doubted therefore that it was the pleaders' purpose to make violation of the constitutional provisions the basis of this suit. Before deciding that there is no jurisdiction, the District Court must look to the way the complaint is drawn to see if it is drawn so as to claim a right to recover under the Constitution and laws of the United States. For to that extent, 'the party who brings a suit is master to decide what law he will rely upon and . . . . does determine whether he will bring a "suit arising under" the . . . . (Constitution or laws) of the United States by his declaration or bill.' " *Bell v. Hood,* 327 U.S. 678 (46).

It is well established that petitions for the Great Writ are to be most liberally construed in favor of the right of human freedom. *Fay v. Noia,* 372 U.S. 391 (63). Viewed in this light, it cannot be doubted that petitioner was attempting to set forth claims under the Constitution and laws of the United States. The Magistrate's recommendation cannot stand upon the grounds suggested.

The Magistrate's January 3 recommendation that probable cause be denied is prefaced "As set out in the Findings, Conclusions and Recommendation * * * heretofore filed * * *." However, there is absolutely no statement or inference to be gleaned from the original recommendation dated September 18 to the effect that petitioner has failed to invoke the Constitution and laws of the United States. To the contrary, the original recommendation is sprinkled with the terms "due process," "equal protection," "Federal constitutional violation," "constitutional dimensions," "Federal relief," "Federal violation," "Federal

rights" and the like. Several federal authorities are cited. There is an obvious non sequitur between the original recommendation and the recommendation to deny certificate of probable cause on grounds that petitioner has not invoked the Constitution and laws of the United States. Manifestly, petitioner has done so. On September 18, the Magistrate assumed that petitioner had done so. His January 3 recommendation does not square with his previous findings.[6] Nor can petitioners federal claims be labeled "completely frivolous and wholly without substance." The Magistrate returned no such finding on September 18. Neither did he make any such finding on January 3. It would further appear that Judge Higginbottom was of the opinion that the petition contained meritorious grounds or he would not have admitted petitioner to bail. Further, respondent filed an answer (R. 60), something which the State is not required to do without an express order, *R.*4 *fol.* 28 *USC* §2254, a step which is rarely taken by state's attorneys when they view the petition as baseless. The fact that the state answered at all operates as a silent concession that the state views the petition to possess some merit.

Considering the fact that a certificate is needed by all state prisoners, very little has been written in the Fifth Circuit, or elsewhere concerning the proper test to be applied in ruling upon an application for certificate of probable cause. The test enunciated by the Ninth Circuit in

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[6]The District Court signed the Magistrate's January 3 mimeograph but he failed to complete the blank wherein he was supposed to state his "reasons." To assume that he was adopting the Magistrate's recommendation after "independent" review of the record constitutes a complete and final abandonment of **Wingo v. Wedding, 418 U.S. 461 (74).**

Blair v. California, 340 F.2d 741 (9-CA 65) has been most widely applied. Commenting on *Blair,* Professor Sokol states:

> "There is a vast difference between a weak case, even a very weak case, and a frivolous one. In this regard the test employed by the Ninth Circuit is a good one, 'it is frivolous only if the applicant can make no rational argument on the law or facts in support of his claim for relief.' *Blair v. California,* 340 F.2d 741 (9th Cir. 1965). It may well be that there are arguments that can be made on behalf of the petitioner that are well beyond the law's existing frontier but well within the frontier of rationality. Only when the frontier of the latter is passed does the case become frivolous." Sokol, *Fed. Habeas,* 196 (69).

The test as above stated has been applied in the Fifth Circuit, *Dillingham v. Wainwright,* 422 FS 259 (SDFL 76), affd. 555 F.2d 1389 (4-FL 77) where the court stated that the petitioner's claim was " 'very weak,' " but nonetheless, "a rational argument on the law" and therefore allowed the appeal. Accord: *Capetta v. Wainwright,* 286 FS 404 (SDFL 68). The present case easily fits the test laid down in those cases. It follows that the certificate should have been granted.

In asking for a certificate of probable cause, petitioner was not asking the Court to decide the case in his favor. Petitioner was only asking leave to be heard. The requirement for certificate of probable cause is only for the purpose of winnowing out those cases which are patently without merit. The right of appeal is of constitutional dimension. *Rinaldi v. Yeager,* 384 U.S. 305 (66). The statutory require-

ment for certificate of probable cause was not designed to impinge upon that right.

Manifestly, the proper test has not been applied. The action is not entirely wanting in merit and because it cannot be so labeled, a certificate should have been granted.

Conclusion

For the reasons given, a writ of certiorari should issue to review the judgment of the Fifth Circuit.

Respectfully submitted,

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Attorney for Petitioner

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1980

NO. 80-————

CHARLES BEN HOWELL ..... *Petitioner*

v.

CARL THOMAS, SHERIFF,
DALLAS COUNTY, TEXAS ..... *Respondent*

PETITIONER'S APPENDIX

Proceedings In State Trial Courts

DOMESTIC RELATIONS COURT 2, DALLAS COUNTY, TEXAS; MARRIAGE OF NORMAN & EDNA RALSTON; NO. 71-8259-DR/2

JUDGMENT OF CONTEMPT
[Filed July 27, 1972]

ON THIS the 27th day of July, 1972, came on for trial the above-styled and numbered cause; and the said CHARLES BEN HOWELL, a witness in the said cause, testified that he had requested four attorneys to represent him, all without avail; and the said CHARLES BEN HOWELL being asked upon cross-examination to name

those four attorneys, refused to do so; and the Court having ordered said CHARLES BEN HOWELL to answer the said question and reveal the said attorneys' names or to be found in contempt of court, continued to refuse to answer and does at this time refuse to answer the said question;

IT IS THEREFORE ORDERED AND ADJUDGED that the said CHARLES BEN HOWELL is in direct contempt of this court and the said CHARLES BEN HOWELL is hereby committed to the custody of the Sheriff of Dallas County to be confined in the Dallas County Jail until such time as he shall purge himself by revealing the names of the said four attorneys; and the Court further finds CHARLES BEN HOWELL in contempt of this court and sets his punishment at a fine of $500.00 and confinement in the County Jail for a period of thirty days.

/s/ Louis T. Holland
JUDGE

Judge *Retired Judge* Judicial District
Court Sitting For Judge Domestic Relations
Court *No.* 2 of Dallas County, Texas

[R. 20]

162ND DISTRICT COURT, DALLAS COUNTY, TEXAS; DEE BROWN WALKER VS. CHARLES BEN HOWELL; NO. 71-8259-DR/2

JUDGMENT OF CONTEMPT
[Filed July 28, 1972]

ON THIS the 27th day of July, 1972 came on for trial the above styled and numbered cause; and the Court having heard the evidence, finds that CHARLES BEN HOWELL

is guilty of contempt of the Court committed on the 26th day of May, 1971; the said CHARLES BEN HOWELL failed to make full disclosure as to all of the facts surrounding the matters before the Court after the Court had directly inquired of the said CHARLES BEN HOWELL, as to all of the said matters;

THEREFORE, IT IS ORDERED AND ADJUDGED that the said CHARLES BEN HOWELL is guilty of contempt of Court, and the Court sentences him to pay a fine of $100.00 and commitment in the County Jail for a period of three days, and the Court hereby commits the said CHARLES BEN HOWELL to the custody of the Sheriff of Dallas County, Texas, until the fine and the term of imprisonment have been satisfied.

/s/ Louis T. Holland
JUDGE

JUDGE *Retired* Sitting for Judge
Domestic Relations Court *No.* 2 of
Dallas County, Texas

[R. 18]

Proceedings In Texas Court of Criminal Appeals

TX.CT.CRIM.APP.; Ex parte CHARLES BEN HOWELL; NO. 8,194

MOTION FOR LEAVE TO FILE ORIGINAL APPLICATION FOR HABEAS CORPUS
[Filed June 25, 1979]
[Text Omitted]

[Handwritten notation thereon:]
6-25-79

Motion for leave to file original application for writ of habeas corpus denied.

/s/ John F. Onion, Jr.
Presiding Judge

Clinton J. not participating

[R. 12]

Proceedings In U.S. District Court

U.S.DIST.CT., N.D.TX., DALLAS DIV., CHARLES BEN HOWELL V. CARL THOMAS, SHERIFF; CA 3-79-0825-D.

FINDINGS, CONCLUSIONS AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE
[Filed Sept. 18, 1979]

Pursuant to the provisions of 28 U.S.C. 636(b), and an Order of the Court in implementation thereof, the subject cause has previously been referred to the United States Magistrate. The findings, conclusions and recommendation of the Magistrate, as evidenced by his signature thereto, are as follows:

FINDINGS AND CONCLUSIONS:

Type Case: This is a petition for Writ of Habeas Corpus relief filed pursuant to 28 U.S.C. §2241, et seq.

Parties: Petitioner, Charles Ben Howell, is subject to commitment pursuant to judgments of contempt heretofore entered by a State District Court of Dallas County, Texas. Respondent is the Sheriff of Dallas County, Texas, and has constructive custody of the Petitioner.

Statement of the Case: The operative facts on which

the present judgments of contempt are predicated are set out in the Court of Criminal Appeals' opinion affirming the contempt judgments against Petitioner in *Ex Parte Charles Ben Howell,* 488 SW2d 123 (Tx. Ct. of Crim. App. 1972) appeal dismissed for want of substantial Federal question, 414 U.S. 803 (1973).

Petitioner has previously sought Federal habeas corpus relief in this Court, and Petitioner's prior application was denied. The District Court's denial of relief was affirmed by the Fifth Circuit in *Howell v. Jones,* 516 F.2d 53 (5th Cir. 1975) reh. *en banc* den. 521 F.2d 815; cert. den. 424 U.S. 916 reh. den. 425 U.S. 945.

In support of his present application Petitioner alleges the following grounds for relief:

1. The District Clerk of Dallas County, without notice and without the benefit of any order of a judge authorized to preside in contempt proceedings issued process directing the Petitioner to be placed in jail pursuant to the sentences imposed in the presiding judge's judgments of contempt. Petitioner alleges that he was not present when sentence was imposed. In addition, he contends that the action of the District Clerk constituted a denial of equal protection.

2. Petitioner alleges that he has not been given credit for partial payment of the fine imposed and has not been given credit for time served on the sentence of incarceration. The attempt to enforce the contempt judgments previously entered against the Petitioner without an additional order from the presiding judge of the court in which the contempt occurred violates due process and equal protection rights of the Petitioner.

3. Petitioner alleges that the absence of an order of

commitment entered by the judge who entered the judgments of contempt or by the incumbent judge deprives the Petitioner of remission of the penalties imposed.

4. The refusal of Petitioner's motion for leave to file a Writ of Habeas Corpus by the Texas Court of Criminal Appeals and the practice of the Texas Court of Criminal Appeals requiring that leave be granted before a Writ of Habeas Corpus can be filed violates Petitioner's due process rights.

In his answer Respondent does not contest the fact that Petitioner has exhausted available state remedies. Accordingly Petitioner's application is before this Court for a ruling on the merits.

Findings and Conclusions: As to Petitioner's first ground for relief, it is observed that his statement in his application that "the Fifth Circuit held that the judicial order of commitment was no longer enforceable" is an incorrect statement of the holding of the Fifth Circuit. The opinion of the Fifth Circuit stated:

> "In addition to the two criminal contempt convictions, Howell was ordered to 'be confined in the Dallas County Jail until such time as he shall purge himself by revealing the names of the said four attorneys.' The contempt proceedings have terminated, Howell cannot be confined under this order since he has no further opportunity to purge himself of contempt." *Howell v. Jones, supra,* at page 56.

From the language quoted above and the resolution of Petitioner's appeal from the District Court's order denying the Writ of Habeas Corpus in the above case, it is clear that

the Fifth Circuit held only that the civil aspects, *i.e.*, commitment until the contempt was purged was nullified because the contempt proceedings themselves had terminated. The Fifth Circuit did not purport to set aside or modify in any respect the penalties imposed occasioned by the Petitioner's contumacious conduct.

Apparently Petitioner claims that under State law he is entitled to another sentencing hearing before the judge that entered the contempt judgment or his successor. Petitioner does not contend that he was not present when the original judgments of contempt were entered.

Respondent in his answer observes that under Texas State law no further orders are required to be entered by the trial court prior to execution of the judgment. *Ex Parte Woodruff,* 483 SW2d 951 (Tx.Civ.App. Texarkana 1972); *Ex Parte Coward,* 222 SW 531 (Tx. 1920).

Even if it be assumed that Texas procedural law contemplates a further "sentencing proceeding", no Federal constitutional violation has been demonstrated. A violation of State procedural law is insufficient to state a ground for Federal habeas corpus relief. *Van Povck v. Wainwright,* 595 F.2d 1083 (5th Cir. 1979); *Bell v. Estelle,* 525 F.2d 656, 657 (5th Cir. 1970); cf. *Nichols v. Estelle,* 556 F.2d 1330 (5th Cir. 1977).

The contempt hearing and the announcement and entry of the presiding court's judgments satisfies "due process" requirements under the United States Constitution, and the sentencing procedures utilized by the State courts are not matters of constitutional dimensions. *Johnson v. State of Arizona,* 462 F.2d 1352 (9th Cir. 1972). Accordingly,

Petitioner's first ground for relief is without merit and should be denied.

In Petitioner's second ground he reiterates the fact that the District Clerk has issued process without further order of a court. He cites no authority for the proposition that this is in violation of Federal constitutional rights. As part of his second ground he also alleges that he has not been given credit for payment of a portion of the fine imposed and that he has not been given credit for partial service of the jail sentence.

The Respondent has attached a receipt issued to Patricia Howell which reflects that the sum of $100.00 was delivered to the Sheriff of Dallas County. This receipt on its face demonstrates that the $100.00 was not in partial payment of the monetary fine, but rather was a bond to insure the appearance of the Petitioner in the contempt of court action.

The length of confinement is prematurely raised in the present application particularly in light of the fact that Petitioner has not submitted to any incarceration and cannot establish prospectively that he will not receive credit for time previously served. Accordingly, Petitioner's second ground for relief is without merit.

Petitioner's third ground for relief is a variation of his first ground. In the third ground Petitioner claims that only the incumbent judge is authorized to commit the Petitioner under the previously entered judgments of contempt. He further alleges that the incumbent judge at the time of the filing of his application in the present cause has declined to execute an order of commitment. Petitioner is apparently troubled by the fact that he believes under

Texas State law only the incumbent judge or the presiding judge is empowered to reduce or commute his sentence. The Respondent in his answer observes that to the contrary the Petitioner can seek remission from any other District Court judge of Dallas County, Texas. See Article 199a, §2.002, Texas Civil Statutes.

The matters of which Petitioner complains in his third ground are matters of State law, and do not arise to "due process" dimensions. No basis for Federal relief is demonstrated. No constitutionl right of the Petitioner has been violated and Petitioner's third ground for relief should be denied.

In his fourth ground for relief Petitioner contends that he has been denied due process of law by reason of the Texas Court of Criminal Appeals's refusal to grant him leave to file his application for habeas corpus in that court.

Petitioner cites no authority for the proposition that a habeas court is required to consider every application for Writ of Habeas Corpus on its merits. This Court is unable to find any Federal violation occasioned by the Texas Court of Criminal Appeals's refusal to accept Petitioner's application for Writ of Habeas Corpus, especially in light of the fact that that court has previously carefully considered the validity of the judgments of contempt in its prior opinion. *Ex Parte Howell, supra.*

Moreover, the habeas corpus powers granted to Federal courts provide sufficiently broad prophylactic procedures to insure that a State petitioner's Federal rights are protected. Petitioner's fourth ground for relief is without merit and should be denied.

RECOMMENDATION:

For the foregoing reasons it is recommended that Petitioner's application for Writ of Habeas Corpus be denied and dismissed. It is further recommended that the stay of execution effected by the District Court's order admitting the Petitioner to bail on June 27, 1979, be dissolved and set aside.

It is further recommended that the judgment entered by the District Court dismissing Petitioner's application be stayed for a period of twenty days from the date of said judgment in order to permit Petitioner to seek appellate review.

[R. 73-78]

ORDER [ADOPTING MAGISTRATE'S FINDINGS]
[Caption as immediately foregoing; filed Oct. 10, 1979]

After making an independent review of the pleadings, files and records in this case, and the findings, conclusions and recommendation of the United States Magistrate, and after considering Petitioner's Objections to Findings, Conclusions and Recommendation of the United States Magistrate, I am of the opinion that the findings and conclusions of the Magistrate are correct and they are adopted as the findings and conclusions of the Court.

IT IS, THEREFORE, ORDERED that the Findings, Conclusions and Recommendation of the United States Magistrate are adopted.

IT IS FURTHER ORDERED that Order of this Court admitting Petitioner to Bail is vacated ten (10) days from the file date of this Order.

SIGNED AND ENTERED this 10th day of October, 1979.

[R. 96]

JUDGMENT

[Caption as immediately foregoing; filed Oct. 10, 1979]

This action came on for consideration by the Court, and the issues having been duly considered and a decision duly rendered,

It is ORDERED, ADJUDGED AND DECREED that the Petitioner's application be, and it is hereby, refused and dismissed.

IT IS FURTHER ORDERED that the Clerk shall transmit a true copy of this order, together with a true copy of the Findings, Conclusions and Recommendation of the United States Magistrate and the Order adopting the Findings, Conclusions and Recommendation of the United States Magistrate to Petitioner and Respondent.

SIGNED AND ENTERED this 10th day of October, 1979.

[R. 97]

ORDER

[Caption as immediately foregoing; filed Oct. 18, 1979]

The petitioner's motion for certificate of probable cause together with a request for an order extending petitioner's bail came on for consideration before the court, the Honorable Robert M. Hill, United States District Judge. The court has considered the motion and is of the opinion

that petitioner's motion for certificate of probable cause pursuant to 28 U.S.C. §2253 for appeal to the court of appeals should be denied because of the reasons set out in the Findings, Conclusions and Recommendation of the United States Magistrate adopted by this court on October 10, 1979.

The court is also of the opinion that petitioner's motion for bail pending appeal should be denied.

It is so ORDERED.

Dated this 17th day of October, 1979.

[R. 100]

[RECOMMENDATION AND ORDER THEREON — One page form]

[Caption as immediately foregoing; filed Jan. 4, 1980]

A notice of appeal has been filed in the subject proceeding. Pursuant to the provisions of Rule 22(b), Federal Rules of Appellate Procedure, I recommend that a certificate of probable cause be denied. Recommendation of denial, if made, is based on the following reasons:

> As set out in the Findings, Conclusions and Recommendation of the Magistrate heretofore filed in the above styled and numbered action, Petitioner's claims arise under Texas State law, and such grounds fail to state violations cognizable under the Constitution of the United States.

ORDER OF THE COURT ON THE FOREGOING RECOMMENDATION:

After a review of the files and records of the case and

the recommendation of the Magistrate, I find that a certificate of probate of probable cause should be denied. IT IS SO ORDERED. The reasons for denial of a certificate of probable cause, if such is denied, are as follows:

[Petitioner's Note: Remainder of form is blank]

[R. 108]

Proceedings In The Fifth Circuit

U.S. COURT OF APPEALS, FIFTH CIRCUIT: CHARLES BEN HOWELL V. CARL THOMAS, SHERIFF; NO.80-8048

ORDER

[Filed March 17, 1980]

REAVLEY, Circuit Judge:

IT IS ORDERED that petitioner's application for certificate of probable cause is denied.

ORDER

[Caption as immediately foregoing; filed April 14, 1980]
Before Godbold, Reavley and Anderson, Circuit Judges

BY THE COURT:

A member of this panel has heretofore denied petitioner's application for a certificate of probable cause. Upon consideration by this panel upon request of petitioner, IT IS ORDERED that petitioner's application for certificate of probable cause is denied.

DALLAS TIMES HERALD. Thursday, July 15, 1976 ....C—5

Jury may get disbarment case today

By PAUL WEST
Staff Writer

The disbarment trial of Republican judicial candidate Charles Ben Howell was expected to go to the jury today following final arguments by both sides in 101st District Court here.

In testimony Wednesday, Howell was labelled "a sick man" by District Judge Dee Brown Walker, his opponent in the November general election race for the 162nd District Court bench.

Howell, 51, of Dallas, is accused of professional misconduct by the State Bar of Texas in connection with a 1971 case in which he allegedly failed to disclose all facts of a divorce action to Walker when he asked him to award custody of children to his client.

The state bar rested its case Wednesday afternoon following an appearance by Walker, who filed the original disbarment complaint against Howell in 1972.

Walker disputed Howell's testimony that he informed the judge of another pending case involving his client when he sought a ruling from Walker in May 1971.



Charles Ben Howell . . .
. . . nears end of trial

"He did not," Walker said bluntly, when questioned about Howell's actions by state bar attorney Stan McMurry of Dallas.

Howell testified Tuesday he informed Walker of the existence of the other suit but didn't provide details "because Judge Walker didn't ask."

But Walker contended Howell had a

duty as a lawyer to provide the information without being asked.

"Part of the judicial system is the responsibility on the lawyer to be candid and open to a judge," Walker testified. "And they have just as much responsibility to see that justice is done as I do."

Walker said he considered Howell "a sick man" and that "many members of the bar and bench" agreed with him.

"Practically all of them (Dallas lawyers and judges) think something's wrong with him," testified Walker.

"Mentally wrong?" asked McMurry.

"Yes, sir," replied the judge.

Walker named Dallas attorneys William Pritchard and Larry Anderson and Dist. Judges Ted Robertson, Hugh Snodgrass and Fred Harless among those who agreed with his assessment of Howell.

"I don't think he ought to have a (law) license," concluded Walker.

Walker, who has served 13 years on the county district bench, acknowleged under cross examination that if Howell is disbarred it will disqualify him from the November election race.

Howell, a four-time loser in county judgeship contests, faces reprimand, suspension or revocation of his legal license if the jury rules against him.

In testimony Wednesday Howell flatly denied violating professional ethics in his handling of the divorce case.

Asked by defense attorney Waggoner Carr, former Texas attorney general, if he had behaved fraudulently or broken the professional ethics code in handling the divorce action, Howell replied, "No, sir."

The defense said it hoped to call several character witnesses on Howell's behalf when the trial resumed at 9 a.m. this morning, but a series of rulings by presiding Judge Frank Wear of Paris cast doubt they would be allowed to testifiy.

Wear said he did not think character witnesses were allawed to testify in civil cases and asked lawyers for both sides to present arguments on the question when court convenes this morning.

The jury will decide the case but Wear must set the penalty, if the jury rules against Howell.

Judge Walker's efforts to jail 'candidate' foiled again

By SCOTT PARKS

Judge Dee Brown Walker has been trying to put perennial Republican political candidate Charles Ben Howell in jail for the past seven years, but he was foiled again Thursday by the federal courts.

"I don't know why (U.S. Dist. Judge Patrick) Higginbotham got to be involved in this case," Walker fumed. "It used to be the federal courts were a big deal. Now they are just glorified justice of the peace courts."

Higginbotham issued a writ of habeas corpus Wednesday to keep Howell out of jail on two contempt of court charges, the merits of which have been heard by federal and state courts on numerous occasions the past seven years.

"The judge just issued a temporary order to maintain the status quo," said a clerk in Higginbotham's office.

This week's flurry of legal activity marks the latest chapter in the case that has made Howell a celebrity, albeit not a popular one, in legal circles.

In 1971 Howell was one of the attorneys in a divorce case in Judge Greer Dowell's court. Howell needed some action on a certain phase of the case and took it to Walker's court.

Walker claimed Howell lied to him about what aspects of the case were before Dowell, then cited Howell for contempt of court.

Under state law, contempt charges against a lawyer must be heard by an impartial judge. Judge Louis Holland of Montague County came into the case, found Howell guilty and sentenced him to three days in jail and a $100 fine.

During that proceeding, Howell said he tried to hire four lawyers to defend him but was unable to secure any of them because they feared retribution from Walker.

Holland demanded Howell reveal the names of the attorneys, but Howell refused, a decision that brought him another contempt citation and a sentence of 30 days in jail and a $500 fine.

Howell was a candidate for district court at the time, and he claimed the charges were politically motivated by the Democratic establishment at the courthouse. Walker claimed the charges were pursued solely because "lying to a judge cannot be tolerated. The system would break down if it happened often."

And thus began the legal maneuverings of Charles Ben Howell.

His last attempt to get the contempt sentences overturned in federal court ended last November when the U.S. Su-

preme Court denied him a hearing. That left the door open for the state to carry out the sentence, but everyone at the courthouse had seemed to lose interest in Howell and his case.

Everyone, that is, except Walker.

He began to ask the district attorney's office (former Assistant Dist. Atty. John Tolle specifically) to push through the contempt judgments and to get the sheriff's office to put Howell in jail.

However, Tolle left the district attorney's office to become a federal magistrate and the Howell case was held in limbo.

"I kept requesting the district attorney to get the thing up," Walker said. "It seems to me the guy ought to serve his time after seven years."

So the state district clerk's office drew up the two arrest warrants — one for each contempt charge — and sent them to the sheriff's department for service.

Tom McCorkle, Howell's attorney, went to Austin Monday to ask the Texas Court of Criminal Appeals, the state court of last resort in criminal cases, to consider granting a writ of habeas corpus in the case.

The court refused.

McCorkle said the refusal allowed him to carry the case to federal court. Memories vary, but it is either the third or fourth time the case has been before a federal court.

The arrest warrants drawn up and signed by a deputy district clerk were not valid, McCorkle said, because they amounted to a formal sentencing.

"Only a judge can do that," McCorkle said.

Walker said the original contempt judgments were enough to constitute sentencing and should be honored.

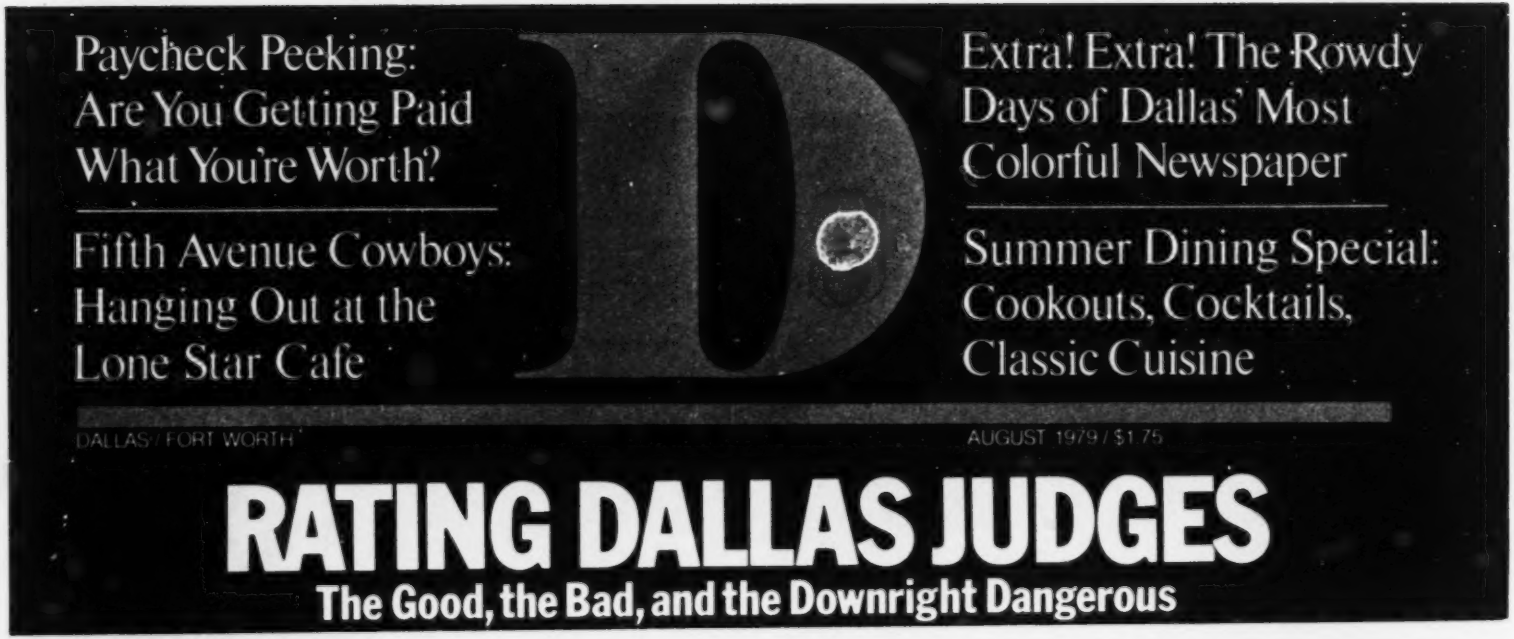
McCorkle also said Dowell, who had jurisdiction in the original divorce case, was approached by the district attorney's office to press the contempt cases but refused to do so.

"In effect, Judge Dowell forgave Charlie," McCorkle said. "And he is the only judge that can put him in jail."

Higginbotham transferred the case to U.S. Dist. Judge Robert Hill's court Thursday because Hill apparently has heard the case before.

It now appears the next step will be a hearing on the writ of habeas corpus issued by Higginbotham, but even that is unclear.

"We will be instructed by the court what to do," McCorkle said. "Whatever they tell us to do, we will do."



WORST JUDGE

DEE BROWN WALKER

162nd District Court
Born 1912. SMU law school. Admitted to bar 1935. Appointed to bench 1963.

Judge Walker is more than just a bad judge; he is a living legend, known far and wide as the worst judge in Dallas County. Walker is bad on so many different levels it is hard to know where to begin. Take the way he runs his courtroom: "He tells you that his court will reconvene at 1:30 after a lunch break," says one lawyer. "That means you won't see him until three o'clock. It doesn't seem to bother him at all that he can let a simple proceeding drag on for days and days." He openly rules his court by whim, going off on self-serving, personal campaigns like his seven-year crusade to get former political adversary Charles Ben Howell jailed for contempt of court over an incident that happened in Walker's courtroom when Howell was representing a divorce case there. When U.S. Dist. Judge Patrick Higginbotham recently issued a writ that kept Howell from going to jail, Walker, exercising his typical lack of restraint, called the federal courts "just glorified justice of the peace courts." Walker is not even subtle about the fact that his likes and dislikes count much more than the law in his courtroom. "If he doesn't like a jury's verdict, he will issue a 'judgement n.o.v.' [judgement notwithstanding the verdict]. That basically means 'to hell with what the jury thinks; we're gonna do what I think,' " says one lawyer. Only 37 percent of the attorneys in Dallas surveyed in the last Bar poll think Walker correctly applies the rules of procedure and law in his courtroom. Most astute lawyers know that Walker doesn't pay much attention to the fine points of the law, and they use that fact to their advantage. "Judge Walker," says one attorney, "will issue a temporary restraining order against anybody for anything at any time. It's as easy to get a TRO in his court as it is to

walk into Baskin-Robbins and take a number." Several lawyers we interviewed said they think Walker provides a service with his free-wheeling policy towards restraining orders. "Sure it's not the law," says an attorney, "but it sure is nice to know that you can always get an extra 10 days to think something over by simply sliding by Dee Brown's and getting a TRO." One of his more infamous restraining orders enjoined KDFW-TV from broadcasting one of the parts of a consumer fraud series. Clearly an unconstitutional prior restraint of the press, his order was struck down by a higher court within a couple of days.

Walker has the demeanor of an old-time Southern sheriff. He is the original redneck. He once briefed a group of young attorneys on "how to handle your nigger witnesses," and once admonished a young girl who wanted to change her name to match her adopted father's name because "it sounds too much like a Mexican name." Originally appointed to the bench by John Connally in 1963, Walker has benefited at the polls because of his notoriety. "Most people have seen Judge Walker's name in the paper," says one of his critics, "but they don't remember at election time that what they read about him was all bad." But it is.

